EMPLOYMENT TRIBUNALS

Claimant		Respondent
Ms J Marzec	v	**Wincanton Group Limited**

PRELIMINARY HEARING

Heard at: **Sheffield** **On:** **9 March 2017**

Before: **Employment Judge Little**

Members: **Ms B R Hodgkinson**

Mr K Smith

Appearance:

For the Claimant: **Mr M Kozik, Consultant**

For the Respondent: **Ms K Moss, of Counsel (instructed by Clarks Legal LLP)**

Interpreter: **Mr T Gorszwa**

COSTS JUDGMENT

The unanimous judgment of the Tribunal is that:-

1. No costs order is made against the claimant.

2. A wasted costs order is made against the claimant's representative K L Law Limited.

3. The amount of the costs order is £6,300 and K L Law Limited will make that payment to the respondent's solicitors forthwith.

REASONS

1. These reasons are given at the request of Mr Kozik, the claimant's representative and a Director of K L Law Limited.

2. K L Law Limited has two Directors and the second Director is Magdalena Lappa. Mr Kozik has represented the claimant at this hearing and Ms Lappa has been present. We were told that she undertook certain preparatory work for the claimant's case.

3. The claim before the Tribunal initially comprised complaints of direct race discrimination; direct sex discrimination; harassment related to sex; indirect disability discrimination; failure to make reasonable adjustments and constructive

unfair dismissal. However on day one the claimant withdrew the indirect disability discrimination complaint at the beginning of the Hearing.

4. On day three, following cross-examination, the claimant was being questioned by the Employment Judge. It was discovered that the claimant had a diary entry in respect of an alleged conversation with her manager on 25 May 2016. According to the claimant's witness statement (paragraph 59) the claimant had complained to the manager that a task she had been given was not a reasonable adjustment and that the task was unsafe. The claimant's evidence as per her witness statement continued that the manager had told her that if she did not like the task he would send her back to picking permanently. The claimant had her diary with her and through the services of the Tribunal appointed interpreter a translation of the relatively brief entry in her diary for 25 May 2016 was produced. In significant regards that did not tally with what the claimant had said in her witness statement.

5. The Employment Judge then asked the claimant whether she had diary notes or entries in respect of two significant meetings with managers (15 May 2016 and 6 June 2016) in respect of which in her witness statement and in cross-examination the claimant had contended that the respondent had produced inaccurate and manipulated notes. The claimant replied that she did have entries in her diary for those two meetings. None of the three diary entries referred to had been disclosed to the respondent during the course of these proceedings.

6. At this point the respondent's Counsel, Ms Moss, expressed concern that there may well be other diary entries, undisclosed, which may either have supported the claimant's case or not supported it. This was in relation to the claimant's contention in her witness statement and during cross-examination that she had, over a lengthy period of time, sought light duties and referrals to Occupational Health.

7. This raised the issue therefore that there may have been a substantial failure on the claimant's part to disclose relevant documents. Whilst we have been told that the claimant disclosed some diary entries (with translations) in two tranches (the second tranche being disclosed approximately a week prior to our Hearing) the respondent had not to date raised any issue as to whether there might be other relevant diary entries. What had been disclosed was no more than a handful of entries.

8. Having adjourned to consider the best way forward the Tribunal proposed that there should be an adjournment so that Ms Moss and the claimant's representative could go through the diary or diaries in question, identifying the relevant but hitherto undisclosed entries. Subject to the amount of entries thereby discovered we proposed that the Interpreter prepare translations. It then seemed likely that it would be necessary for there to be further cross-examination of the claimant to deal with the new documents.

9. We had also been told, for the first time, on day three, that the majority of the respondent's witnesses would not be available on Friday, the fifth day of the Hearing. There had been some confusion about the length of the Hearing. At a case management discussion on 22 October 2016 it had been agreed that four

days would be sufficient. However, when shortly after that preliminary hearing a notice of hearing was issued it was for five days – the whole week. Neither party had queried that discrepancy.

10. In these circumstances when making our proposal above we noted that whilst it would be possible to finish the claimant's and her witnesses evidence during the allocated time it was inevitable that the case would go part heard as far as the respondent's evidence was concerned.

11. On putting this proposal to the parties Mr Kozik's immediate response was to indicate that the claimant wished to withdraw her claim. This came as something of a surprise, not the least because at the time the claimant was still under oath and had been warned. How therefore could Mr Kozik have taken these instructions? He responded that they had come via Mr Tatinger – the claimant's former boyfriend and her other witness. On the basis that that implied that Mr Tatinger had spoken to the claimant that too was whilst she was under oath. In the circumstances we gave permission for the claimant and Mr Kozik to speak (if they had not already done so) in order that we could be clear whether Mr Kozik actually had instructions to withdraw. After a short adjournment for this purpose Mr Kozik returned to confirm that the claimant did wish to withdraw and he confirmed to the Tribunal that she had no objection to the whole of her claim being dismissed on withdrawal and that was our judgment.

The costs application

12. Ms Moss then indicated that she had instructions to make an application for costs. It became clear that Mr Kozik was aware that such an application was going to be made – that is prior to informing us that the claimant withdrew.

13. Mr Kozik contended that it would not be appropriate for the Tribunal to deal with the costs application within the remaining time available (which was two days). That was because he contended that it was necessary for the claimant to adduce medical evidence. Mr Kozik anticipated (rightly as it turned out) that Ms Moss would contend that part of the claimant's unreasonable conduct of the proceedings was in relation to her evasiveness under cross-examination. Mr Kozik suggested for the first time that this was because of the claimant's mental state. Whilst we had been informed that both the claimant's parents were seriously ill in Poland we had not hitherto been informed that the claimant was suffering from stress or other mental illness so as to adversely affect her performance in cross-examination. The Tribunal's opinion of that performance was that, even allowing for the medium of interpretation – sometimes we were told by Mr Kozik not entirely accurate interpretation, the claimant's approach seemed to be to register (but not articulate) what her answer to a given question should be and then to give as an answer a statement which was intended to qualify contextualise or excuse her non articulated answer to the question. We took the view that it would not be within the overriding objective to require the parties to return for a costs hearing sometime in the future – not least because we were told that the claimant was intending to permanently return to Poland and there remained two days hearing time within which to deal with the matter.

14. On day four we heard the costs application proper. Ms Moss had prepared a skeleton argument. She contended that there were two grounds for making a costs order against the claimant herself. There had been unreasonableness in bringing the claim and in conducting it. In addition the claim was misconceived.

15. The alleged unreasonableness was the knowing failure to disclose relevant documents; the making of groundless allegations; 'lying in her evidence'; failing to include in her witness statement evidence required to prove disabled status or evidence as to why complaints, obviously out of time, should have extensions of time and continuing the proceedings in spite of two costs warnings and an offer of settlement.

16. The complaints were said to be misconceived for a variety of reasons including time issues in relation to race discrimination and sex discrimination and what was contended to be a failure to discharge the initial burden of proof.

17. The respondent was also making an application for wasted costs against the claimant's representative. That was because an allegedly misconceived claim had been advanced and because 'disclosure must have been handled negligently'. If a client produced a few extracts from a diary, Ms Moss contended that a competent representative would ask to see the rest of the diary to check whether it was relevant or not. She contended that if disclosure had been dealt with properly it should have been made clear to the claimant that she did not have a credible claim and so that claim would not have been pursued.

18. Whilst it was said that the respondent's legal costs were in the region of £16,000 the application before us was limited to Counsel's fees which we were told were £9,500. We were invited to apportion any costs order as between the claimant and her representative as we saw fit.

19. <u>The claimant's position on the costs application against her</u>

    As we had requested on day three, the claimant had prepared a statement of means which indicated that she had a balance of £407.19 in her bank and had no other savings. She had no income having not worked since the end of November 2016. Such savings as she had had been expended on fees paid to her representative, both in respect of her own case and in respect of an Employment Tribunal claim brought by her then partner, Mr Tatinger. The claimant had produced a one page balance confirmation from Lloyds Bank but no bank statements. During the course of her cross-examination on means the claimant had confirmed that she had no other assets either in the UK or in Poland. Some of the cross-examination appeared to be directed at the question of mitigation of loss which, as we pointed out to Ms Moss was not relevant to the issue under consideration. It was the claimant's clear evidence that because of difficulties in agency work she had obtained and then subsequently left and because of the need to go back to Poland frequently to look after her parents, she had not been in employment since the end of November 2016. The claimant had also been acting as de facto carer for Mr Tatinger.

20. Mr Kozik in his submissions reiterated the claimant's financial situation. He felt that the stress which the claimant was under in relation to her family situation had

contributed to the way in which she had given evidence; he said that "we" (meaning we assume Mr Kozik and his colleague) had enquired whether the claimant was fit to give evidence. None of this of course had been mentioned hitherto to the Tribunal. Mr Kozik suggested that evidence that we would have heard from Mr Tatinger would have supported the claimant's race discrimination complaint and it would have been contended that the sex discrimination complaint was not out of time because there had been a continuing act. There had been no need for the claimant's witness statement to say more than it had about her disability status because the claimant relied on the case of Banaszczyk v Booker Limited with the result that all that needed to be considered was the claimant's ability to lift whilst at work.

21. Mr Kozik's submissions on the wasted costs application

At the beginning of today's hearing we asked Mr Kozik whether he had professional indemnity insurance – in which case we envisaged that Mr Kozik's organisation (K L Law Limited) would need to report the wasted costs application to those insurers who would then become an interested party and may wish to appoint representation. However, Mr Kozik said that there was no such insurance and he had no objection to the application being considered today. Essentially Mr Kozik blamed his client for not telling him that there were more diary entries than had been provided to him. He explained that because the claimant lived in Doncaster and he was based in St. Albans the claimant had never visited his office and that communications between them had been via Skype. It appeared that Mr Kozik would not have met the claimant until the recent hearing of Mr Tatinger's claim in which Ms Marzec was a witness. He contended that his organisation had asked the claimant whether there were any other diary entries but suggested that perhaps the claimant had not understood that request because of her alleged mental state. Mr Kozik pointed out that the respondents had never queried whether there were any other diary entries than those that had been disclosed to them. Mr Kozik said that when he had worked for various solicitors' firms in London it had been common practice not to meet the client but to deal via Skype.

22. The Tribunal's conclusions in relation to the application against the claimant

Rule 76 provides that a costs order can be made where a party has acted unreasonably in either the bringing of the proceedings or the way that the proceedings have been conducted.

Rule 84 provides that in deciding whether to make a costs order or in what amount an order should be made the Tribunal may have regard to the paying party's ability to pay.

23. The unreasonableness ground

The respondent contends that the claimant has lied to the Tribunal and that she has brought groundless allegations of fraud against the respondent (manipulation of meeting notes). Whilst the Tribunal was not, to say the least, entirely happy with the way in which the claimant gave her evidence (see our observations above) the result of the claimant withdrawing her claim before she had even

completed her own evidence means that the Tribunal has not been called upon to make any findings of fact. We have of course heard no evidence at all from the respondent. In these circumstances it has not to date been established that the claimant was not telling the truth.

The somewhat surprising omissions from the claimant's witness statement – nothing on the time issues or any reasons why time should be extended and a lack of clarity as to the claimant's assertion of disabled status – were problematic. The Employment Judge had sought to address these omissions by posing questions to the claimant after cross-examination. However it seemed to us that these omissions whilst potentially being detrimental to the claimant's case could not really be said to have been detrimental to the respondent or increased its costs.

We were however much more concerned about the clear failure to make full disclosure of relevant documents. Whilst we considered that the greater fault lay with the claimant's representative, the failure as alleged by her representative of the claimant to provide all the documentation to the representative had contributed to the ultimate failure to discharge the duty of disclosure. In this regard, whilst we accept that the claimant is a lay person we have also been told that she is someway through a five year masters degree in Law in Poland. As an obviously intelligent person with some legal background we fail to see how she could have considered diary entries about meetings or events where she profoundly disagreed with the respondent's documentation as anything other than highly relevant documents.

24. Were the complaints misconceived?

This is more difficult to assess in circumstances where we have not heard all the evidence and a case which involves jurisdictions which are fact sensitive.

25. The claimant's means

We do consider that this is a case where we should take into account the claimant's means. We are satisfied with her evidence on that topic. It is clear that the claimant's financial situation is somewhat desperate. Due to various factors, not the least her parents' health, she is on the brink of returning to Poland it seems, permanently. In these circumstances, we have decided not to make a costs order against the claimant herself. That is purely on the basis of her financial situation. But for that we would have taken the view that the claimant should bear one third of the costs sought having regard to her part in the failure to disclose.

26. The Tribunal's conclusions in respect of the wasted costs application

Rule 80 of the Employment Tribunals Rules of Procedure insofar as relevant to this application provides as follows:

"A tribunal may make a wasted costs order against a representative in favour of any party ("the receiving party") where that party has incurred costs as a result of

any improper unreasonable or negligent act or omission on the part of the representative… . Costs so incurred are described as "wasted costs"

Rule 80(2) defines a representative for these purposes as being a legal or other representative but not one who is not acting in pursuit of profit.

It is not in dispute that Mr Kozik's company K L Law Limited is within this definition.

In the leading case of Ridehalgh v Horsfield 1994 3AER 848 a three stage test was suggested when a Tribunal was dealing with a wasted costs application. First, had the representative acted improperly, unreasonably or negligently? Second, if so did that conduct cause the party applying for costs to incur unnecessary costs? Finally, would it be, in the circumstances, just to order the representative to compensate the other party for the whole or part of the relevant costs.

We read the respondent's application to be one contending that the representative acted negligently (rather than improperly or unreasonably).

We note that 'negligent' for these purposes is to be understood as denoting a failure to act with the competence reasonably to be expected of the representative in question. In this case we are aware that Mr Kozik, a Director of K L Law Limited, has a Polish Law Degree and an English Law Degree. He has told us that he has worked within solicitors' firms and in the Companies House records he gives his occupation as Lawyer. K L Law Limited's note paper (or at least its email headers) notes that it is regulated by the Claims Management Regulator and it describes itself as offering the services of 'Employment Tribunal Advocacy and Legal Consulting'. We note that the other Director, Ms Lappa, is described as having a Graduate Diploma in Law.

Measuring the representative's actions in relation to the duty of disclosure we conclude that they have not met the standard of competence reasonably to be expected of an ordinary member of the claims management fraternity. That is particularly so having regard to the solid legal background which it appears both Directors have. Whilst Mr Kozik has contended that it would not have been practicable for the claimant and either himself or his Co-Director to meet face to face with the claimant, we take the view that before proceedings were launched which made very serious allegations and invoked three separate discrimination jurisdictions, and the not straight forward complaint of constructive dismissal, that a face to face meeting would have been highly desirable. That would have been an opportunity for the claimant to bring to her representative all the documents which she considered might be relevant. It would also have provided an opportunity for the representative to take detailed instructions from the claimant as to any other documents that she might have in her possession but which she had not brought with her. At the very least, if there could not be a face to face meeting, there should have been a clear request from the representative to the claimant to provide copies of all potentially relevant documents. That request should have spelt out precisely what categories of document would be considered relevant. It is common place for employees, especially those who are in dispute with their employer, to keep a diary or some other contemporaneous

record. Accordingly the missing documents in this case cannot be regarded as being obscure or unusual. The negligence (in the Ridehalgh sense) is aggravated by reason of the fact that the claimant did provide some diary entries to the representatives – in fact in two installments. We conclude that that would have put any reasonably competent representative on enquiry that if they had been given copies of certain pages of a diary that there may well be other pages which would contain potentially relevant material.

27. We therefore find that there was negligent conduct.

28. We find that that conduct did cause the respondent to incur unnecessary costs. If the representative had sought and obtained from the claimant the missing diary entries it is likely, in our judgment, that by the standard of a reasonably competent representative the claimant would have been advised to either not pursue the claim or, if commenced abandon it or at the very least to severely limit its scope. Moreover if there had been full disclosure to the respondent it would have been in a position to exert legitimate pressure on the claimant to withdraw by pointing out what may well have been serious discrepancies between her pleaded case and her own contemporaneous documentation.

29. The final consideration is whether it would in the circumstances be just to make a wasted costs order. We accept that there must be some speculation as to the likely result of there being full disclosure by the claimant to her representative and then full disclosure by the representative to the respondent. However, we believe that the consequences are sufficiently probable in the way we have described them above to make an order which in the first place only addresses a part of the respondent's actual costs and secondly which represents two thirds only of the amount actually being sought by the respondent.

We should add that although Rule 84 permits us to have regard to a paying party's means in the context of a wasted costs order we have not been invited to take into account those means. However, clearly the representative is a Limited company, no doubt with assets. We were told that the claimant on behalf of herself and Mr Tatinger's claim had paid some £13,000 to K L Law Limited in respect of Mr Tatinger's costs and her own.

30. We therefore order K L Law Limited to reimburse to the respondent the sum of £6,300 as a contribution to its costs.

Employment Judge Little

Date: 17 March 2017

Sent on: 20 March 2017